## UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD SUBREGION THIRTY-THREE

ART'S WAY VESSELS, INC.

Case 33-CA-15771

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

# ART'S WAY VESSELS, INC.'S ANSWERING BRIEF TO THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Art's Way Vessels, Inc. ("Art's Way") for its brief in answer to the Acting General Counsel's ("General Counsel") Brief in Support of its Exceptions to the Administrative Law Judge's Decision states as follows:

#### Introduction

Art's Way maintains that the General Counsel's objections to Administrative Law Judge Shamwell's ("ALJ") Supplemental Decision as set forth in its Exceptions and Supporting Brief are without merit and requests that the National Labor Relations Board (the "Board") adopt the ALJ's Supplemental Decision in whole.

#### **Statement of the Case**

The Compliance Specification Hearing and resulting Supplemental Decision at issue came about following a September 22, 2010 Decision and Order of the Board<sup>1</sup> requiring Art's Way to, among other things not at issue in this proceeding:

Make whole employees and former employees, with interest, for any and all losses of wages and benefits suffered since September 5, 2008, as a result of the Respondent's repudiation of, and refusal to adhere to,

<sup>&</sup>lt;sup>1</sup> Said Decision and Order was enforced by the Eighth Circuit Court of Appeals following a consent judgment entered into between Art's Way and the Board in April 2011.

the collective-bargaining agreement reached with the Union on September 18, 2006.

The fact that the bargaining unit employees and former employees were due modest backpay under the Order is not in dispute. (Art's Way almost immediately made backpay payments in 2010.) Furthermore, neither the wage rates nor the method of calculating backpay are in dispute. The only dispute between Art's Way and the General Counsel involves Art's Way's claim that it is entitled to deductions from the amount of backpay due for amounts paid to certain employees in return for a release of their claims as well as amounts paid in adjustments to employees' paid time off. In short, the General Counsel is having a conniption over small offsets – less than the small claims jurisdiction in most venues – which were agreed to between the Union and the Employer. General Counsel's objections are ill-founded and an unwise use of taxpayer monies. The Supplemental Decision should be adopted and the exceptions rejected.

#### **Argument**

1. The Backpay Offset for Vacation, Holiday and Paid Time Off is Proper.

In early 2011, Art's Way and the International Association of Machinists and Aerospace Workers, AFL-CIO ("Union") met to collectively bargain in compliance with the Board's Order. As part of the bargaining process, the parties negotiated very specific terms to address the paid time off deficits created by the Union's demand for rescission of Art's Way as a unilateral change allowing additional paid time off benefits. The result of the parties' negotiation on this issue was to award certain extra-contractual "bridge" paid time off (vacation days) to various members of the bargaining unit. The purpose, intention, and effect of this highly individualized award was to put various individuals in a position as good as they would have been in or better. Not only is this "bridge" benefit extra, and outside the

benefits provided by the contract, it clearly addresses the specific problem created in "complying" with the Order per Union demand – individuals were short vacation time and they got it back, in just the right individual measures, through collective bargaining. Art's Way "pocketed" nothing.

The General Counsel argues that the Union did not "intend" to use the bargained for "bridge time" to resolve Art's Way's backpay liability and; therefore, it is not an appropriate offset. However, the intent of the Union is immaterial because the effect of the parties bargaining was to resolve the Union's paid time off claims through collective bargaining, which was the primary object of the underlying Board matter. The Board has previously recognized and approved such bargaining as akin to a grievance resolution, even when General Counsel objects. *Gourmet Toast Corporation*, 2011 WL 2433351 (June 16, 2011) (citing Combustion Engineering, 272 NLRB 215, 217 (1984) and Central Cartage Co., 206 NLRB 337, 338 (1973)). Approval of the settlement reached through collective bargaining here "fosters rather than undercuts the Act's key goal of encouraging parties to resolve labor disputes by reaching collective bargaining agreements rather than resorting to the Board's process." *Hospital Perea*, 356 NLRB #150 slip op at 1-2 (April 29, 2011).

The General Counsel further argues that the judge's use of equitable principles was improper. However, the guiding principle underlying an award of backpay is to make employees whole for the losses due to the employer's unfair labor practice. *Continental Ins. Co.* 289 NLRB 579, 583 (1988). When the employer has already compensated the employees in some manner for their losses, the amount of that compensation should be deducted from the gross backpay award to avoid overcompensating the employees. *Id.* The equitable principles cited by the ALJ support an offset of the "bridge time" paid by Art's Way in order to avoid

overcompensating the bargaining unit employees. The parties' common sense resolution of the Board's order to unscramble this particular omelet was properly given effect by the ALJ.

#### 2. The Employees' Releases Effectively Released their Backpay Claims.

In Iowa, the intent of the parties is determined by the words they chose to use in their agreement. *See RPC Liquidation v. Iowa Dept. of Transp.*, 717 N.W.2d 317, 321 (Iowa 2006); *State Public Defender v. Iowa Dist Ct.*, 594 N.W. 2d 34, 37 (Iowa 1999); *Whalen v. Connelly*, 545 N.W. 2d 284, 291 (Iowa 1996). Here, Dolter and Maas under the auspices of the union, and with the knowledge of the government, agreed as follows:

"[T]he parties wish to fully and finally resolve any and all claims that [Maas and Dolter] may have, including, but not limited to, those claims alleged in the Grievances."

And, that each party "has had the opportunity to consult with competent counsel, and that he understands and acknowledges the significance and consequence of [the Agreement] and executes it voluntarily with full understanding of its consequences."

After so stating, "[Dolter and Maas]...fully, finally, and forever...releases Art's Way...from any and all manner of claims...sum of money...damages..whch he now has or heretofore had since the beginning of time through the date hereof, <u>including</u> <u>without limitation</u>...<u>any claims arising out of or relating to [his] employment at Art's Way."</u>

The language could not be more clear – nor more inclusive. Further, Maas agreed that this was "the entire agreement....and replaces any and all prior negotiations, understandings, promises, representations, inducements, and discussions, whether written or oral."

The cardinal principle of the Act is the encouragement of collective bargaining, which includes the settlement of disputes through the grievance and arbitration procedures of collective-bargaining contracts. *Coca-Cola Bottling Co.*, 243 NLRB No. 89 (1979). To effectuate this principle, the Board encourages parties to resolve disputes without Board

intervention and upholds voluntarily negotiated agreements. *Combustion Engineering*, 272 NLRB 215, 217 (1984). General Counsel doesn't need to be involved for the settlement to be valid. *Central Cartage Co.*, 206 NLRB 337, 338 (1973).

Each settlement is evaluated on a case-by-case basis to determine whether it will have effect on enforcement proceedings. *Independent Stave Co.*, 287 NLRB 740 (1989).

In deciding whether it will effectuate the purposes and policies of the Act to give effect to a settlement, the Board has considered such factors as the risks involved in protracted litigation which may be lost in whole or in part, the early restoration of industrial harmony by making concessions, and the conservation of the Board's resources. In addition, the Board has considered whether the parties to the dispute and the employees affected by the dispute have agreed to the settlement, whether the settlement was the product of a grievance-arbitration mechanism, and whether the agreement was entered into voluntarily by the parties, without fraud or coercion.

Id.

In the instant case, Dolter and Maas along with the Union voluntarily agreed to enter into the respective Release and Settlement Agreements with Art's Way. Further, the parties most directly interested in assuring that the employees' rights be vindicated— Dolter and Maas and their Union—voluntarily agreed to release Dolter and Maas's backpay claim in exchange for the respective amounts paid. The parties executed the settlement agreement before the backpay hearing began, and the settlement was reasonable considering the uncertainties inherent in litigation. There was no coercion exerted in obtaining Dolter and Maas releases. Finally, Art's Way has no history of violating or breaching prior settlement agreements. Under all these circumstances, honoring the Release and Settlement Agreements advances the Act's purpose of encouraging dispute resolution *See American Pacific Pipe Co.*, 290 NLRB No. 77 (1988). Furthermore, none of the parties directly involved has raised any

issues concerning the settlement, and all parties are willing to abide by its terms. *Central Cartage Co.*, 206 NLRB 337, 338 (1973).

The ALJ was correct in determining that the agreements with Dolter and Maas should be enforced according to their terms and their backpay claims be estopped.

### 3. <u>The Backpay Calculations were Properly Supported.</u>

The General Counsel correctly asserts that the parties stipulated to the formula and computation of the *gross backpay* in the Compliance Specification. An examination of the gross backpay figures in both the Compliance Specification, Appendix B-25 and Art's Way's spreadsheet show virtually identical numbers<sup>2</sup> in the Gross Backpay columns.

The Backpay Calculation Summary spreadsheet submitted by Art's Way is self-explanatory and, as the ALJ obviously found, it requires no detailed explanation regarding how the calculations were made. However, because the General Counsel's analysis suggests a lack of comprehension, Art's Way offers the following explanation.

As set forth above, the first five columns (Wage Rate Backpay, Overtime Backpay, Holiday Backpay, Vacation Backpay, and Gross Backpay) were derived directly from the Subregion's Backpay Calculation Summary submitted as Appendix B-25 to the Compliance Specification.

\$684.66. Bob Lenhardt's Gross Backpay amount of \$2843.17 was miscalculated by the Subregion in the amount of -\$0.01. Bob Lenhardt's actual Gross Backpay, using the Subregion's figures for Wage Rate Backpay, Overtime Backpay, Holiday Backpay and Vacation Backpay, was \$2843.18. Brian Wepking's Gross Backpay amount of \$1051.77 was miscalculated by the Subregion in the amount of \$0.01. Brian Wepking's actual Gross Backpay, using the Subregion's figures for Wage Rate Backpay, Overtime Backpay, Holiday Backpay and Vacation Backpay, was \$1051.76. Further, the figures in the Subregion's Gross Backpay column were miscalculated by \$0.02.

6

<sup>&</sup>lt;sup>2</sup> Mathematical errors in the Compliance Specification account for the miniscule difference in the totals in the Gross Backpay columns of Art's Way and the Subregion. Toby Hicks's Gross Backpay amount of \$684.65 was miscalculated by the Subregion in the amount of -\$0.01. Toby Hicks's actual Gross Backpay, using the Subregion's figures for Wage Rate Backpay, Overtime Backpay, Holiday Backpay and Vacation Backpay, was

The Interest Originally Calculated by NLRB column was derived from the original Backpay Calculation Summary submitted by the Subregion to Art's Way on June 9, 2011.

The Less Backpay Amounts Already Paid by Art's Way column was calculated by subtracting the Overtime Backpay amounts from the Subregion's Less Amount Already Paid by Employer column. Art's Way paid the \$1,476.65 due in Overtime Backpay prior the filing of the Compliance Specification. (See Compliance Specification, Page 7, Paragraph 17.) The purpose of subtracting the Overtime Backpay paid from the Amount Already Paid was to avoid double-counting the offset in Art's Way's calculation.

The Total Backpay and Interest per NLRB column was calculated by adding the Gross Backpay and Interest Originally Calculated by NLRB columns and subtracting the Less Backpay Amounts Already Paid by Art's Way. This column as well as the Interest Originally Calculated by NLRB column were intended only to illustrate the differences in the calculations performed by Art's Way and the NLRB and have no bearing on Art's Way's calculation of Net Backpay Owed.

The Less Overtime/Holiday/Vacation Backpay column was calculated by adding the Overtime Backpay, Holiday Backpay and Vacation Backpay columns. Art's Way's basis for this column is the facts that employees were already paid or credited for Overtime Backpay, Holiday Backpay and Vacation Backpay amounts due before the Compliance Specification was filed. As set forth above, Art's Way paid the Overtime Backpay amounts due. Furthermore, as part of the collective bargaining process with the Union, Art's Way credited the employees for the Holiday Backpay and Vacation Backpay amounts due to the employees. (See March 14, 2011 letter to Gregory Ramsay.) Therefore, Art's Way did not

owe the employees anything for Overtime Backpay, Holiday Backpay and Vacation Backpay at the time the Compliance Specification was filed.

The Less Value of Bridge Pay In Excess of CBA column was calculated using the amount of bridge time awarded multiplied by an average \$15.00 wage rate for the employees referenced in Art's Way's Backpay Calculation Summary spreadsheet. As stated on the spreadsheet, this agreement was detailed in an April 15, 2011 letter to Gary Papenheim. The amounts in this column are not duplicative of the offsets for Holiday Backpay and Vacation Backpay in the previous column because these bridge pay amounts were awarded in excess of the Holiday Backpay and Vacation Backpay credits given to various employees.

The Less Amount Release per Settlement column was derived from the settlement agreements entered into with Jesse Maas and Robert Dolter.

Finally, the Net Backpay Owed per Art's Way was calculated by subtracting the Less Backpay Amounts Already Paid by Art's Way, Less Overtime/Holiday/Vacation Backpay, Less Value of Bridge Pay In Excess of CBA and Less Amount Release Per Settlement columns from the Gross Backpay column.

The General Counsel contends that alleged errors in the figures led to an incorrect calculation of backpay due. However, as set forth above, any errors were due to mistakes made by the Subregion. Further, any errors in the figures were so minimal as to be insignificant. Finally, as pointed out by the General Counsel, a calculation is acceptable as long as it is not unreasonable or arbitrary. The ALJ's reasoning for using the figures and calculations, was not arbitrary. In fact, it was supported by the evidence.

**Conclusion and Summary** 

For the reasons set forth above, Art's Way respectfully requests that the Board affirm

Administrative Law Judge Shamwell's Supplemental Decision in its entirety. A healthy

collective bargaining relationship has been restored between the Union and the Employer, to

the satisfaction of each and, as importantly, Art's Way's dozen or so employees. The efforts

of government apparatchiks to meddle in, and upset, these simple, common sense private

resolutions are ill-placed and should be summarily rejected – with an admonition to not

further waste valuable Board, government, and private resources over-litigating small claims

which have been settled fairly and squarely to the parties' satisfaction.

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9

#### **CERTIFICATE OF SERVICE**

I hereby certify that on May 11, 2012, I electronically filed the foregoing using the Agency's E-Filing system. The undersigned hereby certifies that a true and correct copy of the foregoing instrument was served via e-mail to the following party:

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